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No. 86-1782

In The
Supreme Court of the United States
October Term, 1986

BLACK HILLS POWER AND LIGHT COMPANY, a South Dakota corporation, and SOUTH DAKOTA PUBLIC UTILIITES COMMISSION and the STATE OF SOUTH DAKOTA,
Petitioners,

vs.

CASPER W. WEINBERGER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the District Court (unreported) is set forth in Petitioner's Appendix (pages 25a-40a). The opinion of the Court of Appeals for the Eighth Circuit is reported at 808 F. 2d 665 and set forth in Petitioners' Appendix (pages 3a-22a).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CITATIONS TO PERTINENT AUTHORITY

Following is a list of citations to pertinent authority, the text of some of the authority being set out verbatim in the Petitioners' Appendix pursuant to Supreme Court Rule 21.1(f) because of the lengthy nature of the provisions.

1. Fed. Reg. 16988-16991 (May 7, 1986) (reprinted in Petitioners' Appendix).

2. P.L. 99-591 Sec. 620, 100 Stat. 3341-333, (99th Cong. Oct. 30, 1986): Sec. 620: None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Federal Register 16988-16991), or any other regulation issued pursuant to statute requiring competitive bidding for electricity, gas, or steam utility services acquired by the Federal Government.

3. P.L. 99-591 Sec. 9111, 100 Stat. 3341-120 (99th Cong. Oct. 30, 1986): Sec. 9111. None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Fed. Reg. 16988-16991), or section 8.304-91 of the Air Force Supplement issued on June 24, 1985.

4. Arms Services Procurement Regulation Supplement No. 5, dated as of October 1, 1974, incorporated at 48 C.F.R. Sec. 208.3 (selected portions reprinted in Petitioners' Appendix).

5. U.S. Const. Art. 1, Sec. 8, Cl. 17: Congress has the power to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of

the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

6. U.S. Const. Art. VI, Cl. 2: This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

7. 10 U.S.C. 2301(a): The Congress finds that in order to ensure national defense preparedness, conserve fiscal resources, and enhance defense production capability, it is in the interest of the United States that property and services be acquired for the Department of Defense in the most timely, economic, and efficient manner. It is therefore the policy of Congress that - - (1) full and open competitive procedures shall be used by the Department of Defense in accordance with the requirements of this chapter;. .

8. 10 U.S.C. 2303(a): This chapter applies to the procurement by any of the following agencies, for its use or otherwise, of all property (other than land) and all services for which payment is to be made from appropriated funds: (1) The Department of Defense. . . . (4) The Department of the Air Force. .

9. 10 U.S.C. 2304:

(a)(1) Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services - -

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984; and

(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedure appropriate under the circumstances, the head of an agency - -

(A) shall solicit sealed bids if - -

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid;

10. SDCL 49-34A-1(3) defines customer as any person contracting for or purchasing gas or electric service from a utility.

11. SDCL 49-34A-1(11) defines person as a natural person, a partnership, a private corporation, a public corporation, a municipality, an association, a cooperative whether incorporated or not, a joint stock association, a business trust, any political subdivision or agency, or two or more persons having joint or common interest.

12. SDCL 49-34A-42 provides for an electric utility's exclusive rights in assigned service area:

"Each electric utility shall have the exclusive right to provide electric service at retail at each and every location where it is serving a customer as of March 21, 1975, and to each and every present and future customer in its assigned service area and no electric utility shall render or extend electric service at retail within the assigned service area of another electric utility unless such other electric utility consents thereto in writing; provided, that any electric utility may extend its facilities through the assigned service area of another electric utility if the extension is neces-

sary to facilitate the electric utility connecting its facilities or customers within its own assigned service area."

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts are as stated in Petitioners' Petition and in the decisions of the District Court (Petitioners' Appendix at 26a-30a) and the Court of Appeals (Petitioners' Appendix at 3a-6a).

SUMMARY OF ARGUMENT

The South Dakota Public Utilities Commission directly interfered with the United States' control over the provision of electrical service with Ellsworth Air Force Base, and such interference violates the Supremacy Clause of the United States Constitution, Article VI, cl 2.

Where there is a conflict between federal and state law, federal law will preempt state law. State law in this case conflicts with federal law and the EAFB procurement official was not required to follow state law. Federal procurement law preempted South Dakota franchise area law in this case.

The Competition in Contracting Act of 1984, Pub. Law No. 98-369, 98 Stat. 1175 (July 18, 1984), 10 U.S.C. Sec. 2301(a), 2303(a), 2304(a), mandates competitive bidding except where the contracting official is allowed to exercise discretion in the procurement of property and services.

Supplement No. 5 does not mandate EAFB to purchase utility services from Black Hills. If the Department of Defense gives deference to South Dakota franchise area laws, it does so as a matter of comity rather than law.

The United States statutes and regulations applicable to the procurement of electricity at EAFB are designed to ensure active competition that the United States may receive the most advantageous contract. Competition is the rule, not the exception.

The decision of the United States Court of Appeals

for the Eighth Circuit in this case does not conflict with United States Supreme Court decisions. The Competition in Contracting Act of 1984, Pub. Law No. 98-369, 98 Stat. 1175 (July 18, 1984), renders United States v. State Corporation Commission of Virginia, 345 F. Supp. 843 (1972) moot.

The *United States was not a person* as defined in SDCL 49-34A-1(11) and, therefore, not a *customer* as defined in SDCL 49-34A-1(3). *Since the United States was not a customer* as required under SDCL 49-34A-42, Black Hills was not serving a *customer* (EAFB) as of March 21, 1975, and it did not have the exclusive right to provide electric service to EAFB.

The District Court's holding above nullifies Petitioners' claim that the federal government should abide by state franchise territory restrictions and renders the resolution of Petitioners' Question Presented for Review unnecessary.

ARGUMENT FOR DISALLOWANCE OF WRIT

I. The decision of the United States Court of Appeals for the Eighth Circuit followed settled law.

The decision of the United States Court of Appeals for the Eighth Circuit below is plainly correct and follows settled law. The Court determined that the South Dakota PUC had no authority to include the federal enclave, Ellsworth Air Force Base (EAFB), in its assigned service territories for the purpose of exerting control over sales of electric service that are consummated within the federal territory. South Dakota has no jurisdiction to prevent the United States from using competitive bidding to purchase electric service for delivery within the enclave.

By ordering the United States to contract with Black Hills based on an assigned service area, the South Dakota Public Utilities Commission has directly interfered with

the United States' control over the provision of electrical serve within EAFB. State regulation of utility service to federal installations intrudes upon the exercise of exclusive federal jurisdiction. In dealing with EAFB, a federal enclave, the United States has exclusive jurisdiction even absent conflict between state and federal regulation. The United States Supreme Court has held "the cases make clear that enclaves that meet the requirements of Art. 1, Sec. 8, Cl. 17 by its own weight, bars state regulation without specific congressional action." *Paul v. United States*, 371 U.S. 245, 253, 9 L.Ed.2d 292, 83 S.Ct. 426 (1963).

The statutes and regulations applicable to the procurement of electricity at EAFB are designed to ensure "active competition so that the United States may receive the most advantageous contract." Competitive bidding is the rule not the exception. *Paul v. United States*, supra. It is clear that federal procurement law preempted state franchise area laws for the provision of electric service to EAFB, a federal enclave. South Dakota's attempt to interfere with this clear policy is impermissible.

Petitioners' claim that Armed Services Procurement Regulations, Supplement No. 5 (ASPR-S5), require the United States to purchase electric service from Black Hills because EAFB is within Black Hills' assigned service area, is without substance. EAFB is not within Black Hills' exclusive assigned service area for the reasons stated below. Only part of the base is in Black Hills' assigned service area; the other part of the base is in the assigned area of West River Electric Association, Inc.

In procuring additional power for EAFB, the Air Force was not required to follow the guidelines of "Armed Services Procurement Regulation Supplement No. 5 (ASPR-S5)".

The ASPR No. 5 is issued for guidance of the Department of Defense personnel engaged in the procure-

ment and administration of contracts for utility services. The Forward to ASPR No. 5, (page 60a of Appendix to Petitioners' Petition for Writ of Certiorari) states:

> "This supplement is issued pursuant to 1-103.6 for the *guidance* of Department of Defense personnel engaged in the procurement and administration of contracts for utility services . . ." (emphasis added)

Supplement 5 does not mandate EAFB to purchase utility service from utilities having franchised territories. Section S5-103.2 indicates that, as *a matter of comity rather than law*, (emphasis added) the armed services will comply with state regulatory decisions concerning "accounting practices, allowability of cost pricing, and rates . . . " (Petitioners' Appendix, Page 63a) Only in these *specific* areas has the Defense Department, as a matter of policy, deferred to state regulation. None of these specific areas is involved in this case. This regulation refers to franchised territory only as an example of when competition might not be present as a practical matter; it provides no indication whatsoever that the United States is bound by local franchising law. This Regulation does not provide the kind of "clear and unambiguous" intent necessary to subject the United States to state regulation. Further, this regulation refers to those matters over which the appropriate regulatory body has taken jurisdiction. In this case the South Dakota PUC has no jurisdiction over the United States or Heartland.

Supplement 5-104.1 regulation is consistent with the clear directive federal statutes and general acquisition regulations that competition and cost factors are the rule:

> "Where competition is found to exist, competitive solicitation of proposals shall be initiated at whatever time is considered to be most advantageous to the Government."

The applicable statutes and regulations were followed in this case and competitive procurement was initiated by the United States. The Air Force's interpretation of its

own regulations to permit it to seek competition in this situation is entitled to great deference. *Zenith Radio Corp. v. United States*, 437 U. S. 443, 457-458 (1978).

The Armed Services Procurement Regulation speaks in unambiguous terms of a policy "to use that method of procurement which will be most advantageous to the government - price, quality and other factors considered." It is specifically designed to ensure active competition so that the government may receive the most advantageous contract.

The Court in the Paul case, supra, further held that the determination of whether to follow state price regulation was clearly within the discretion of the procurement official. As in the Paul case where the 1962 Act failed to show a congressional purpose to abandon competitive bidding, the statutes applicable to this case also fail to show such purpose and mandate competitive bidding. This settled principal of law applies equally to the procurement of electricity as it does to milk price regulation. Congress has reaffirmed such mandate by the passage of the Competition in Contracting Act of 1984, Pub. Law No. 98-369, 98 Stat. 1175 (July 18, 1984), 10 U.S.C. Sec. 2301(a), 2303(a), 2304(a) and subsequent sections of Chapter 137, effective for all solicitations for proposals after March 31, 1985, which act is as specific as the previous statute in providing that the Department of Defense must use competitive procedures unless in exercising its discretion it determines that competition does not exist. This law does not mandate that federal officers follow utility law in procuring electric service.

Where there is a conflict between federal and state law, state law must yield and federal law will preempt state law. *Florida Lime and Avocado Growers, Inc. v. Paul*, 83 S. Ct. 1210, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248 (1963). In this case the conflict is clear: Federal procurement policy demands competition if it is available and state

law (SDCL 49-34A) attempts to eliminate competition.

Where there is any conflict between the state regulatory scheme and the federal procurement policy, the state law cannot overide the federal law. Generally, local state laws are not permitted to shape federal procurement policy. *Boeing Co. v. U. S.*, 480 F. 2d 854 (1973). Thus, the determination of whether competition exists is not one to be made based on South Dakota utility franchise law, but instead is within the sound discretion of the United States Air Force.

In this case the Petitioners do not show that the state interest dominates the federal interest. EAFB became a federal enclave ceded to the federal government a long time before the enactment of SDCL 49-34A. The United States has exclusive jurisdiction over EAFB and may contract with Heartland or others without state interference.

II. The decision of the Eighth Circuit does not conflict with previous opinions of the United States Supreme Court.

Petitioners rely on United States v. State Corporation Commission of Virginia, 345 F. Supp. 843 (1972), affirmed without opinion 409 U. S. 1094 (1973), claiming that the regulation quoted in said case is similar to that contained in Supplement 5 at S5-103.2(a). We do not share such opinion. Petitioners attempt to equate the Department of Defense regulations relating to the procurement of communication services with Supplement 5 at S5-103.2(a) that, "The Department of Defense procures utility services from industries which are, to a greater or lesser extent, regulated by federal, state and local regulatory bodies." However, they fail to continue with the next sentence of such regulation which plainly states, "Notwithstanding the other provisions of this Regulation, as to those matters over which the appropriate regulatory body has taken jurisdiction, it is the policy of the Department of Defense, *as a matter of comity rather than law*, to comply with the cur-

rent regulations, practices and decisions of that body concerning accounting practices, allowability of cost pricing, and rates, subject to judicial appeal through normal channels." (Petitioners' Appendix - Page 63a)

As stated above, Supplement 5 was issued for guidance only and such regulation refers to franchised territory only as an example when competition might not be present; as a practical matter, it provides no indication whatsoever that the United States is bound by local franchising law.

Further, when the State Corporation Commission of Virginia case, supra, was decided, the Competition in Contracting Act of 1984 was not in existence and such legislation moots said decision. This Act mandates that full and open competition procedures shall be used by the Department of Defense in the procurement of property and services. 10 U.S.C. Sec. 2301(a). It is the policy of Congress that procurement procedures for the Department of Defense and the Department of the Air Force shall be in accordance with the requirements of Chapter 137 – Procurement Generally – (1) Promote full and open competition. 10 U.S.C. Sec. 2301(b), 2304(a)(1)(A)(B).

The Eighth Circuit was correct in its determination that competition exists. Supplement No. 5 mandates that "proposals shall be solicited from all potential suppliers." S5-104.1(a) Thus the actions of the Air Force in seeking competitive bidding for overrun electricity was clearly authorized by the relevant procurement statutes and regulations.

In this case, the District Court and the Appellate Court both determined that the South Dakota state law conflicted with federal statute and policy. The State of South Dakota could not regulate indirectly (by regulating the distributor or supplier) what under the Supremacy Clause it is not permitted to regulate directly (that is, the Federal Government). The procurement official was not required to follow state law. Thus the determina-

tion of whether competition exists is not one to be made based on South Dakota utility franchise law, but instead is within the sound discretion of the Air Force. Neither the Department of Defense Communications Regulations cited by Petitioners nor Supplement No. 5 require the United States Air Force to contract with any utility and if such regulations would so require they would be in violation of United States statutory law. We do not discern a conflict between the decision of the United States Court of Appeals for the Eighth Circuit and *United States v. State Corporation Commission of Virginia, supra,* for the reasons stated herein.

III. Public Law 99-591 Sec. 9111, 100 Stat. 3341-120 and Public Law 99-591 Sec. 620, 100 Stat. 3341-333 (October 20, 1986) do not require the federal government to defer to South Dakota regulation of franchised territory or require EAFB to purchase utility service from Black Hills.

Petitioners grasp at Public Law 99-591, 100 Stat. 3341-120 and 3341-333 (October 20, 1986) Sec. 9111 and Sec. 620, and advocate that Supplement No. 5 should defer to state regulation. Public Law 99-591 merely precluded the use of appropriated funds to implement or enforce the Department of Defense proposed rule of May 7, 1986 (51 Fed. Reg. 16988-16991) or Sec. 8.304-91 of the Air Force FAR Supplement issued June 24, 1985, or any other regulation issued pursuant to statute requiring competitive bidding for electricity, gas or steam utility services acquired by the federal government. It did not rescind Supplement No. 5. but reaffirmed such supplement.

Further, the Conference Committee directed the Department of Defense "not to implement additional changes affecting the purchase of utilities until after they have been formally presented to and approved by the Committee on Appropriations of the House and Senate". 132 Cong. Rec. H10728 (daily edition, Oct. 15, 1986)

The House Report refers to the States right to regulate *retail sales* and distribution of electricity. It does not deal with wholesale sales. The District Court did not reach the question whether the sale by Heartland to EAFB was a wholesale sale or a retail sale. Heartland has vigorously maintained before the PUC and the District and Appellate Courts that its sale of electricity to EAFB was a wholesale sale. The Appellate Court noted the matter and stated:

> "For our present purpose, it is relevant to note only that, whatever label is given to the type of electric service being provided, the electricity delivered by WAPA and by the supplier of the overrun amounts is used for the same purposes. Thus, there is more than one authorized utility providing the same service."

(Petitioners' Appendix – Page 22a, note 10)

The Eighth Circuit decided that Supplement No. 5 allowed competition and, "does not require the federal government to defer to a state's regulation of franchise territories; nothing in the new legislation changes this." Petitioners' Appendix – Page 21a

The Congressional Committee reports accompanying the legislation indicate that Congress was concerned with the situation in which a federal facility that obtains all of the electricity from a single utility switches suppliers and abandons a local utility system that has already built the necessary capacity. This is not the situation in this case. Black Hills did not build additional capacity to serve EAFB. It is still serving the Renal Heights housing area. It was not serving the Main Base at the time that Heartland was awarded the contract to supply supplemental electricity to it. It does not have the whole Main Base as its assigned service area and West River Electric Association Inc. was also allocated a portion thereof as part of its assigned service area. Black Hills is neither the "sole source" supplier to EAFB nor does it have EAFB in its assigned service area. Further, the primary supplier of

electricity to EAFB is the Western Power Administration of the United States Department of Energy and the supplemental supplier of electricity at the time of the commencement of the proceedings before the South Dakota Public Utilities Commission was Heartland Consumers Power District, a public corporation and political subdivision of the State of South Dakota; Basin Electric Power Cooperative furnishes supplemental electricity to EAFB. Black Hills is not the sole source supplier to EAFB. Had Congress wanted to mandate that state franchise law governs the determination of when a utility is in a sole "source" position, it could easily have done so. However, Congress has never enacted a statute requiring that the United States purchase utility service from local franchise utilities. The Eighth Circuit was correct in holding that since federal law does not specify such procurement, the PUC could not order EAFB to contract with Black Hills for the overrun electrical service to an exclusive federal enclave. Petitioners advocate that in light of new legislation and legislative history the federal government should not ignore state franchise utilities. In this case such argument is spurious; as shown below Black Hills is not the franchised utility entitled under South Dakota law to exclusively serve EAFB as the supplemental supplier of electricity.

IV. South Dakota utility statutes do not apply to the United States.

The Eighth Circuit affirmed the District Court's decision by the application of federal law. It, therefore, did not pass upon the District Court's determination that it would not declare the contract between the United States and Heartland Consumers Power District (a public corporation and political subdivision of the State of South Dakota) void. (Petitioners Appendix – Pages 38a-39a)

The District Court applies its knowledge of local law holding that the *United States was not a person* as defined

in SDCL 49-34A-1(11) and, therefore, not a *customer* as defined in SDCL 49-34A-1(3). *Since the United States was not a customer* as required under SDCL 49-34A-42, Black Hills was not serving a *customer* (EAFB) as of March 21, 1975, and it did not have the exclusive right to provide electric service to EAFB.

The District Court's holding above nullifies Petitioners' claim that the federal government should abide by state franchise territory restrictions and renders the resolution of Petitioners' Question Presented for Review unnecessary.

CONCLUSION

For the foregoing reasons, the Petition for certiorari should be denied.

Respectfully Submitted,

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